IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

M/s Bajrang Oil Mills VS. The Income Tax Officer, Balotra.

D.B. INCOME TAX APPEAL NO.89/2001
against the order of the Income Tax Appellate Tribunal dt.27.4.95 passed in ITA No.2343/JP/96 for the Assessment Year 1994-95.

Date of judgment : 2nd August, 2006

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE MANAK MOHTA

Mr. Anjay Kothari for the appellant.
Mr. Sangeet Lodha for the respondent.

Reportable

By the Court: (PER HON'BLE RAJESH BALIA, J.)

This appeal is arising out of the order of the Tribunal dated 27th April, 2001 sustaining the penalty levied against the assessee-appellant under Section 271B for failure on the part of the assessee to get its accounts audited and obtain the report of such audit before the date prescribed under Section 44AB.

For the assessment year 1994-95, the

assessee has filed his return on 28th Sept., 1994 declaring the total receipts from sales at Rs.35,38,266.58 declaring total sales amounting to Rs.35,38,266.58 and receipts for job work done by him at Rs.5,57,879.40. Since the gross receipt of the assessee from the sales and the job work done by him exceeded Rs.40 lacs, the Assessing Officer opined that the assessee was under an obligation to get the accounts audited.

The assessee's contention was that since under Section 44AB, three expressions (i) 'total sales', (ii) 'turn over' and (iii) 'gross receipts' are used by legislature each of them are independent criteria and one does not overlap the other.

According to the assessee, since the three expressions are related to three types of business activities, it be considered that under each independent criterion unless the "total sale" or "turnover" or "gross receipts other than the sale or turn over" independently have exceeded 40 lacs, he was not liable statutorily to have his accounts audited. Since in the case of assessee neither "turnover" nor "total sales" nor "gross receipts" excluding "turnover" or

"sales" to be considered independently did not exceed Rs.40 lacs, he was not liable to have his accounts audited for Assessment Year 1994-95. Since for subsequent year he fell into criterion he has got his accounts duly audited and since then he has getting his accounts duly audited every year.

However, the Assessing Officer opined otherwise by finding that the gross receipts include the receipts from all sources. Since the aggregate of the sales and the gross receipts from the job work taken together exceeded Rs.40 lacs he was liable to compulsory audit.

The consequence of not getting compulsory audit as required under Section 44AB has been provided under Section 271B by way of levy of penalty.

In response to notice to show cause against levy of penalty under Section 273B, the assessee pleaded that even if it be assumed that interpretation put by the Assessing Officer is correct, since the Assessee was under the bonafide belief, in view of the language that was deployed by the legislation, that he was not

liable to subject himself to compulsory audit, the penalty ought not to be levied on him for the breach of technical provision since there is no failure on his part to make complete and correct disclosure. He contended that merely because it is lawful to do so it was not necessary in each case that penalty ought necessarily be levied even on every venial or technical breach of law when assessee's conduct cannot be said to be contumacious or willful.

However, these contentions did not prevail with the Assessing Officer. While holding that the assessee was liable to compulsory audit in terms of Section 44AB because aggregate of sales and other receipts from the job work exceeded Rs.40 lacs he had committed breach of the statutory obligation. Consequently, a penalty of Rs.20,530/- under Section 271B was imposed by the Assessing Officer.

The order of the Assessing Officer has been successively affirmed by the CIT (Appeals) vide his order dated 30th Oct., 1996, and the order of the Tribunal under appeal.

At the time of admission of the appeal,

the following substantial questions of law were framed which in the opinion of the Court arose for consideration in this appeal:-

(I) Whether in the facts and circumstances of the case, for the purpose of attracting of Section 44AB, the receipts of an assessee by way of sale or trading business and receipts for doing the job work can be clubbed for the purpose of finding out whether the limit of Rs.40 lakhs prescribed for attracting the provisions of Section 44AB is made out?

(II) If the answer to question (I) is in affirmative, whether holding of belief contrary by an assessee can be held to be bonafide so as to be considered as a reasonable cause in terms of Section 273B read with Section 271B of Income Tax Act, 1961?

(III) Whether penalty u/s 271B could be validly imposed without invoking the provisions of Section 139(9) of the Income Tax Act, 1961?

Coming to the first question, it would be apposite to refer to the provision of Section 44AB itself which was inserted vide Finance Act,

1994 w.e.f. 1.4.1985. This provision was primarily intended to ensure the credibility of accounts maintained by any assessee other than a company, which is otherwise required to get its accounts audited, and the cooperative societies which were also required to be audited by the Cooperative Societies Act. Object for which this clause was sought to be inserted was that a proper audit for the tax purposes would ensure that the books of account and other records are properly maintained and that they faithfully reflect the income of the tax payer and claims for deductions are correctly made by him. Such audit would also help in checking fraudulent practices. It can also facilitate the administration of tax laws by a proper presentation of the accounts before the tax authorities and considerations, like checking correctness of totals and verifying whether purchases and sales are properly vouched or not can be avoided. The time of the assessing officers thus can be saved and can be utilized for attaining to more important investigational aspects of the case.

The aforesaid object was stated in memorandum of notice explaining the provisions in

the Finance Bill 1994 when it was proposed to be inserted in the Income Tax Act, 1961 during the course the Bill was placed before the Parliament.

Coupled with this obligation cast on the assessees, the failure to get accounts audited where it was so required without reasonable cause was also subjected to the provisions of penalty under Section 271B read with Sec.273B as we have noticed above.

The provisions read in the aforesaid context does reflect that the provision was made for compulsory audit both in the case of trading community who derive their income from profits and gains from the business as well as professionals who derive their income by way of professional receipts though they do not deal in commodities or the persons engaged in supply of services though the service is essential part of the profession rendered by them to their constituents. For this reason, the different terminology and the limit was fixed for classifying the persons who would fall within the scope of compulsory audit. Since the income from business of particular nature refers to three different aspects of the receipts by the

businessman namely; receipt from the sales, aggregate of turnover or the gross receipts from whatever sources where the assessee is not involved in the trading commodities. For the last category of persons, criteria laid was of the gross receipts.

The assessee has claimed that in view of three expressions used in clause (a) of Section 44AB; the total sales or turn over or gross receipt are to be viewed in relation to the business to which such sales, turn over or gross receipt are attributable independently. In cases where the assessee is involved in the business of sales of any commodity, its aggregate sales have to be above Rs.40 lacs, if he is to be subjected to compulsory audit.

In case his business is other than that of trading in commodity, his total turnover of the business as a whole must be above Rs.40 lacs or above. Where the assessee is not carrying on business in sale of commodity, if gross receipts of his business exceeds Rs.40 lacs, he is liable to compulsory audit, otherwise he is not liable to compulsory audit, if he is having in 3 different business not falling in same genere and

in each business his aggregate turn over, or sale proceeds or gross receipts separately less than Rs.40 lacs.

Since the assessee carried on business of sales of the commodity manufactured by him, as well as doing the job work which did not relate to sale of commodity, the sale proceeds from sale of goods, and remuneration from job work, could not have been clubbed together for the purpose of Section 44AB. The receipts from job work being not a part of his "total sales" amount received from job work could not have been considered as "sales proceeds". Therefore, it is contended at the first instance that the view taken by the Revenue authorities that sale proceeds from sales and receipts from job work are to be clubbed for operating Sec.44AB, which obligates the assessee to compulsory audit is erroneous.

He further argued that all receipts of whatever nature are not to be included in computing the limit, crossing of which subjected any assessee to compulsory audit of his accounts. If the assessee has large number of investments other than his business, then the returns received on his investment are not to be included

in his gross receipts whether as a businessman or a professional, but it has to be kept aside notwithstanding his returns from investment may be more than Rs.40 lacs. In this connection, the attention was also invited towards clause (b) of Section 44AB which lays down the limit where the professional is required to have his various accounts audited. It is pointed out that where a person is carrying on profession, he is subjected to compulsory audit, if his gross receipts exceeds Rs.10 lacs only. The expressions "turn over" or "sales" have not been used in the case of the applicability of Section 44AB to professionals pointing out that three terms are not used in conjunction but in isolation.

In the alternative, it was also contended that if it be taken that the "sales" and "turnover" and "gross receipts" are inter changeable, vis-a-vis the business carried on by the assessee, if any, in that event, the principle of ejusdem genes is aught to be invoked according to which wherever general words at the end of a group of words is used by the legislative it is to be understood that they take it colour from each other.

It was pointed out by the learned counsel that the word "gross receipts" in its wider sense means aggregate of all receipts of whatever nature from whatever sources. If the expression "gross receipt" in Sec.44AB is understood in this wider sense then the use of expression "total sales" or "turnover" by the legislature becomes redundant and otiose. The gross receipts in case of a person carrying on business and the gross receipts in case of professional would have served the purpose. Legislation cannot be imputed with using any expression which does not convey any definite meaning nor it is understood to have used surplus-sage.

The learned counsel for the revenue urged that looking to the contents of statutory provision and its object, the expression "total sales", "turnover" or "receipts" are primarily related to the "person" who is subjected to statutory obligation and such person must be one who is carrying on business. It is not the totality of volume of receipts of sales from individual business, where such person is carrying on number of businesses but aggregate of all business carried on by such persons which

make him subject to obligation of getting his accounts audited, else the very purpose of providing these provisions would be redundant. Since a professional is not supposed to indulge in trading or business activity other than the professional activity, he cannot have any volume of sales or turnover from the professional service rendered by him which explains exclusion of expression "sales" and "turnover" from sub-clause (b) of Sec.44AB. He further pointed out that since the aggregate of money received or payable to the assessee without claim to any deduction and his obligation under the head Profit and Gains from the business or profession but there is definite distinction between carrying on a business and carrying on a profession. Keeping this distinction in mind lesser limit of gross receipts in the case of a professional has been provided, crossing of which entails his accounts to be subjected to compulsory audit, since no capital investment factor is involved in carrying on profession. Where the assessee is a professional carrying on business in contradiction to profession, it involves investment in capital structure of business. The higher limit of volume of business of the assessee is envisaged for the purpose of

subjecting him to compulsory audit. But in either case it is the total volume of revenue receipts from businesses or professions carried on by the assessee that becomes the touchstone for the purpose of subjecting him to the compulsory audit of his account. The learned counsel pointed out as noticed by us above that object of the provision is to ensure the purity of accounts on the basis of which one may ultimately be assessed by the Assessing Officer which too serves in saving his time in verifying the facts which have been certified by the auditors and he can devote more time to deal with other complexities.

Apart from the purity of accounts and saves delay in procuring information relating to the unaudited accounts by Assessing Officer, it is major device to check the possibility of tax evasion through manipulation of accounts either prepared at a later stage in order to suit the assessee's declaration or by smuggling something otherwise which may not be possible of the accounts is subjected to auditors vigilance by prescribed time.

Having given our careful consideration

to the rival submissions and looking to the object with which the provisions have been enacted, it appears that the maximum limit of Rs.40 lacs has been fixed in the case of every person who is carrying on business and whose total receipts exceeds from his business activity which came under the head income from the profit and gains from the business has to be viewed as one integrated whole and not independently. The assessment of a person is on the total income and not on the income derived from the different sources separately. The three expressions used by the legislation, the total "sales", "turn over" or "gross receipts" though not defined under the Act, in the ordinary sense refers to the volume of the business to which it relates and which is/are carried on by the assessee and in making assessment of profits and gains from the business whether such volume is a part of the business concerns the trading in commodities or otherwise the business activities where the assessee has to indulge in incurring cost before receiving the amount in relation to that business or he is carrying on other business activities in which the cost factor is excluded by the assessee and what he is receiving as charges for the work done by him, like job work, where the raw

material is provided by the other manufacturer, the assessee is merely to relate his receipts to labour charges or procuring cost incurred by him along with part of his profit. It is in that sense that business which is carried on by the assessee has to be taken into totality. It may be noticed that the “sales”, “turnover” or “gross receipts” are not words of art used in relation to any individual transaction independently but has been used as “sales”, “turnover” or “gross receipts”. The expression 'total' qualify all the other three expressions viz. 'sales', 'turnover' and 'gross receipts'. Total sales indicate the aggregate price of the sales of commodities carried out by the assessee as a trading business. Obviously, it would not include such transfer of immovable or movable property by way of investment. Similarly, where the assessee is not merely selling the movable commodities, but relating to other trading activities e.g. where assessee is a land developer and he is engaged in business of acquiring land developing it and selling houses or purchasing or is indulged in leasing business or is indulged in stock market so on and so forth, the expression “turnover” is made out to denote receipts from such activities. There may

be third or residuary category which may not be termed properly a trading activity yet it is carrying on as or business activity like job works for others, without himself being the manufacturing and selling such manufactured goods, or running a motor service garage, for the receipts of such business can aptly termed as receipts of firm. However, integral relation of receipts by a person from business, does indicate that it refers to revenue receipts only and do not include capital receipts and certainly not the receipts which are not relatable to business and may fall under the expression income to be subjected to tax as income from sources other than 'profits or gains from business, profession or vocation.

Having come to the conclusion that on true interpretations of Section 44 AB clause (a) of the Income Tax Act, 1961, the assessee in the present case was required to get his accounts audited as his gross receipts had exceeded Rs.40 lacs during the previous year relevant to assessment year 1994-95, we may next consider the question No.(iii) that has been framed as substantial question of law before considering

question No.(ii).

The question No.(iii) as framed relates to inter-play between the obligation of the assessee to get his accounts audited before the date specified under Explanation (ii) attached with Section 44 AB and the provisions of Section 139(9) in the light of the penalty provisions under Section 271 B read with Sec.273 B.

Section 44 AB requires every person falling in any of the categories (a), (b) & (c) to get his accounts of previous year audited by accountant before the specified date and furnish the report of such audit in the prescribed form duly signed and verified by said accountant as may be prescribed along with return. The specific date has been stated to be 31st day of October of the assessment year.

Sub-section (9) of Section 139 operates where a return has been submitted by the assessee and the Assessing Officer considers whether the return of income furnished by the assessee is defective. It requires the Assessing Officer where he finds that the return submitted by the assessee is defective, he must give him an

opportunity to rectify the defect within a period of fifteen days from the date of such intimation or within such further period which, on an application made in this behalf, the Assessing officer may, in his discretion, allow; and if the defect is not removed within the said period of fifteen days or within the extended period as may be allowed by the Assessing Officer, the return has to be treated invalid and the assessee is considered to have failed to furnish the return.

The provisions of Section 139(9) is of singular importance from the point of view to allow a chance to assessee to make his return complete and specify the defects which are curable and for the purpose of curing that defect an opportunity has to be offered to the assessee before the consequences of such defects follow. In other words, the consequence of non-compliance of requirement of furnishing of valid return takes effect only after the assessee fails to remove the defects within time allowed until the assessee has opportunity to remove such defects, the consequence of such failure to comply with such defects cannot follow.

Clause (bb) of the Explanation attached

with Sub-Section (9) reads as under:-

> "Explanation.- For the purposes of this sub-section, a return of income shall be regarded as defective unless all the following conditions are fulfilled namely :-
>
> (a) ....
> (b) ....
> (bb) the return is accompanied by the report of the audit referred to in section 44AB, or, where the report has been furnished prior to the furnishing of the return, by a copy of such report together with proof of furnishing the report."

Clause (d) of Explanation 2 is relevant which also refers to a return being defective, if it is not accompanied with the copies of audited Profit and Loss Account and Balance Sheet and auditor's report where the assessee maintains regular books of account and the account of assessee has been audited.

In both the provisions requirement of valid return is that it should be accompanied with auditor's report. Where the accounts

required to be audited under Section 44 AB in terms of clause (bb) of the Explanation or where the account books of the assessee are regularly maintained and have been audited then too for a valid return the copy of audit report is required to be annexed to the return. Not annexing the required audit report with the return makes the return defective. In such events, it becomes the duty of the Assessing Officer to notify the assessee about the defect in the return submitted by him and requiring to remove those defects. The defects in respect of requirement of submitting audit report concerning the defect of procedural nature in submitting the return along with the audit report but this defect does not concern literally speaking where the accounts have not been audited as required by law. However, that fact can come to notice only later. At the time when the return shows that assessee's return discloses his turn over or gross receipts to be in excess of rupees forty lakhs, and it is not accompanied with an auditor's report, the Assessing Officer is under an obligation to issue notice calling upon the assessee to furnish the report within 15 days. The next step come when either the assessee does not submit such report within the time allowed by A.O., or finally

extended or he submits such report or he may submit an explanation for not submitting such report.

If no such report is submitted the question may not carry further as in that event the return itself become invalid and it becomes a case where it is to be deemed that the assessee has failed to submit any return which may lead to consequence of default in filing return.

However, the second and third contingency be set further question to be probed. If the accounts have duly been audited before 31st October of the Assessment Year, and such report is submitted after receipt of notice u/s 139(9) the return in all literal sense and substantial sense has to be considered as a valid return to be dealt with in accordance with provision of law.

However, in response to notice u/s 139 (9) the assessee submits a auditor's report in terms of Sec.44 AB and also the audited accounts and balance sheet, but such audit has taken place after 31st October of the Assessment year, the question arises whether furnishing of such auditor's report and audited accounts, results in

filing of valid return or the return remains an invalid as if such belated audit is of no consequence?

Similarly if the assessee, instead of submitting such auditor's report as notified joins an issue about requirement of getting his accounts compulsorily audited at all, whether in such case, the return has to be ignored or opportunity to remove defects of such defective return is to be afforded after such objection is decided, his objection is overruled the Assessing Officer is required to give an opportunity to comply with the provisions in terms of his decision and remove the defect in the return submitted by the assessee, before proceeding further in the matter?

Apparently no such consequences have been provided in the Act for failure to get accounts audited by 31st October. In that case the further contingency comes to fore where assessee submits his return along with auditor's report as required under Sec.44 AB but audit has been conducted after 31st October of the Assessment year. Whether in such case return is to be treated invalid.

All in all the bulls eye is whether specified date fixed for getting accounts audited as per Sec.44 AB is absolute in terms, so that failure to comply makes it incurable default and renders it impossible for the assessee to file a valid return at any time, even if default is held to attributed to reasonable cause with the assessee or leaves a leeway for making compliance with the provision before regular assessment in pursuance of valid return could take place?

In case sec.44 AB applies and it is considered that conduct of audit by 31st October is absolute in terms and cannot be cured by later audit, in no case such assessee can file a valid return and he will always be deemed an assessee, who has failed to file a return required of him and suffer consequence of such default in filing return also and also suffer the indiction of his income escaping assessment due to non-filing of return.

There does not appear any moral to accept such express proposition.

What is the effect of getting accounts

audited in terms of Section 44 AB belatedly does not come within the province of Section 139(9). If there is delay in getting the accounts audited in time but the accounts have been audited in fact after the due date, it may in the given circumstances, which may depend on facts and circumstances of each case constitute a reasonable cause for failure of the assessee to comply with the provisions of Section 44 AB so as to avoid levy of penalty by invoking Section 273 B which in terms provide that failure to comply with Section 44 A for a reasonable cause, the penalty leviable for such under Section 271 B may not be levied. However, in the present case sub-section (9) of Section 139 cannot be invoked. This takes us to consider the last question whether non-compliance with the provisions of Section 44 AB in the present circumstances can be attributed to a bonafide belief held by the assessee about the true interpretation of clause A of 44 AB which was ultimately found to be erroneous can be considered as a reasonable cause for the assessee's failure to get his accounts audited for the assessment year 1994-95 so as to attract the provisions of Section 271 B for absolving himself to levy of penalty.

Apparently when a return is filed unaccompanied with auditor's report as required under Section 44 AB it by itself does not make the person liable for any consequence in the first instance. But he is required to be called upon by the Assessing Officer, if he thinks that it is a case to which Sec.44 AB is attracted to remove the defect for which a minimum 15 days time is given to the assessee. The period may further be extended on an application being made by the assessee in that regard. In provision like the one with which we are concerned, it is primarily of the procedural nature for smooth discharge of functions of the Assessing Officers and is not meant for conferring any benefit on the assessee in respect of liability arising under the taxing statute unlike the benefits conferred under Section 32AB or section 80 HSC and HSD. Neither it creates additional liability in the case of a company with an object to fix minimum tax liability as in the case of an assessee which is a company and is governed by Section 115 J of the Act. Such provision cannot be interpreted in a manner that a person should be held to be in perpetual default which he cannot rectify and result in defeating the basic purpose of the statute and to avoid or minimise

the effect of such procedural non-compliance. Moreover it has also to be seen that while consequence of non-compliance with Section 44 AB invites penalty to be levied on the assessee after affording an opportunity to show cause against levy of such penalty and failure to comply with the requirement of Section 44 AB, if attributable to reasonable cause which may have resulted in default by the assessee then the penalty is also not imposable in terms of Section 273 B. In light of these provisions, if the requirement of removing the defect in return itself has the meaningful purpose to bring home the due levy of tax by securing a complete and valid return from the assessee by giving him an opportunity to remove the defects, which are primarily of the procedural nature, then if during the time afforded to the assessee, he produces the auditor's report or gets his accounts audited on receipt of notice after specified date under Section 44AB which are subject of return and produces the certificate of auditor about the audited account, in our opinion, validates a return and that return is required to be processed by the Assessing Officer. Taking any other view would mean that where audit of account under Section 44 AB is

attracted but such audit has not been completed prior to 31st October of the relevant assessment years, for any reason, would become an incurable default. Consequence will be that because requirement of law is that every return must be accompanied with the auditor's report where Section 44 AB is applicable, and unless such report is produced there cannot be any valid return, such an assessee cannot be in a position to submit a valid return at all which could be taken into consideration by the Assessing officer for the purpose of effecting charge of tax, as such defect cannot be cured.

A construction leads to such a result will lead to absurd end.

We are, therefore, of the opinion that clear purpose of Sec.139(9) in the contract is that whenever from the return submitted by the assessee it appears to the Income Tax Officer or Assessing Officer that accounts of the assessee are required to be audited under Section 44 AB and, therefore, the return ought to have been accompanied with the auditor's report, before rejecting the return as invalid return, he is required to afford an opportunity as a matter of

statutory obligation u/s 139(9) of the Act to the assessee to submit the auditor's report. On receiving such notice, an assessee can avail such opportunity either by submitting the auditor's report if the accounts have already been audited and if the accounts have not been audited by then and he realises that the accounts are required to be audited then he can in the given time get his accounts audited and submit the accounts along with the report of the auditor in terms of clause (bb) and (d) of Section 139(9) of the Act of 1961 and on furnishing of such report with or without audited account as the case may be the return become valid will be required to be processed as such.

There may be yet another contingency where the assessee considers that he is not under an obligation to get his accounts audited u/s 44AB. In such event, he may raise this objection before the Assessing Officer in response to notice U/s 139(a). Where such objection is raised it will be for the Assessing Officer to decide such objection before taking any decision about validity of return. In case the Accessing Officer accepts the objection, that will be end of matter. The Assessing Officer in that case

will proceed with assessment on the basis of return already submitted before him. However, in case the objection raised by assessee is overruled, the Assessing Officer will be required to then call upon the assessee to comply with the provisions of Sec.44 AB within reasonable time to enable a valid return to come before him which could be processed for regular assessment.

The question of considering the issue of penalty cannot arise until that stage has arisen.

The question of penalty for non-compliance cannot be inquired into without reading the provisions of Section 271-B and 273-B as both are integrally enacted. While Section 271 B provides for consequence of non-compliance of Section 44AB. Section 273 B provides defence or way by which the assessee can seek absolution from liability to penalty that arises under Section 271 B.

This brings us to second question which we have noticed to above, assuming it for the sake of arguments that sub-section (9) of Section 139 is not attracted when any accounts have not been audited by 31st of October of the relevant

assessment year as required under Section 44 AB and the accounts are audited thereafter or not audited by the assessee on its own evaluation. It becomes relevant to consider what is the effect of getting accounts audited in terms of Section 44AB belatedly or of raising an issue by the assessee, when he is called upon to remove the defects in return under Section 139(9) for not filing the auditor's report under Section 44 AB along with the return, or inconsequences of proceedings under Section 271 B, that under the law he was not required to get his accounts audited.

Apparently, in terms of Section 273B, the Assessing Officer will be required to consider whether not getting the accounts audited by 31st October of the relevant assessment year was due to any reasonable cause which the assessee may put forward as defence for the failure to comply with the aforesaid provisions. In either case where the assessee raises an issue that his case does not fall within the purview of Section 44 AB before penalty could be levied, the Assessing Officer would be under an obligation to decide such objection raised by the assessee. If the objection is sustained obviously, no occasion

would arise either of filing of auditor's report along with the return so as to complete the defective return on such receipt of the notice under Section 139(9) or to suffer penalty under Section 271B. In case where the Assessing Officer over rules the assessee's objection and holds that the assessee is/was liable to get his accounts audited in terms of Section 44 AB the question is always be germane to consider whether such objection raised by assessee as to his obligation u/s 44AB was frivolous or a plausible stand, before arriving at conclusion whether in such case penalty could be levied.

Section 273 B clearly postulates where the assessee furnishes a reasonable cause for his failure to comply with the provisions which invite penalty under Section 271 B along with certain other provisions, with which we are not presently concerned, no penalty is leviable.

As a matter of law, it cannot be said that in all cases where ultimately the assessee's objection as to his liability to get his accounts audited under Section 44 AB or for any matter non-compliance of any provision, his objections are over ruled, his defects or reason for non-

compliance cannot be considered to be not bonafide. The fact that ultimately on the analysis of the provisions the successive authorities or the Court may come to the conclusion that the objections raised by the assessee about the requirement to comply with the provisions of the Act are not sustainable, does not make objection raised by the assessee to be not bonafide or groundless. The fact that the assessee raises certain questions about interpretation of the statute which needs interpretarial exercise, prima facie supports the assessee in that the objection raised by him is bonafide and he seeks the decision on its merit. The fact that ultimately the court comes to the conclusion against the assessee is no reflection in all cases that objection raised by him were frivolous that answer to objection raised by assessee was self evident, as appears to have been assumed by the Tribunal.

We are, therefore, of the opinion that the Tribunal was not justified in rejecting the assessee's contention that, even if it is ultimately held that the assessee was under an obligation to get his accounts audited under Section 44 AB, he was under bonafide belief about

the true interpretation of the provisions constitutes reasonable cause for not complying with the provisions of Section 44 AB without considering the matter in its totality. In the manner in which the defence of the assessee has been rejected summarily by holding that since the Tribunal found on merit against the assessee, the answer is self evident about the interpretation of Section 44AB and the default cannot be said to be bonafide.

It needs to be reminded that when a matter is brought in appeal before the Court, such appeal lies only in respect of substantial question of law to be framed at the time of admission, when no substantial question of law arises for considering the appeal, cannot be entertained. For that matter under the earlier provisions also the questions of law only could be referred to this Court for its opinion by way of reference. In this connection, the position is also clear from the decisions of the Supreme Court that any question answer to which is self-evident is not a question of law which is required to be referred to this Court or the question which is self-evident or governed cannot be said to be a substantial question of law which

need consideration in an appeal under Section 260A.

The fact that the Tribunal has to take up the interpretorial exercise by referring to the provisions and analyzing the different phraseology used in Section 44 AB(a) before reaching its conclusion at least gives a clue that the interpretorial exercise in respect of objection raised by the assessee was not a self-evident exercise but needed a rational and reasoned approach keeping in view the content, context and object of provisions itself, in conjunction with other provisions of the Act having a relevant bearing of concerned provision.

The fact that this Court while considering the admission of the appeal has found that interpretation of Section 44AB is a substantial question of law requiring consideration by this Court prima facie suggests that the interpretation of Section 44 AB was not self-evident and needed an examination of provisions of Section 44AB and different phraseology used with the aid of interpretorial tools in true scope of the provision.

If that to be so, in our opinion, it cannot be said that the assessee was not bonafide in not getting his accounts audited for the assessment year 1994-95 because he has genuine doubt about his liability to do so which he raised when he was called upon to answer the non-compliance. The question about the interpretation of Section 44 AB was required to be considered by the Revenue Authorities before finding the assessee to be in breach of such provision and which has in fact been considered by the Revenue Authorities albiet ultimate answer is found against the assessee. Moreover, we find from the facts, and about which there is no dispute that for the subsequent years and thereafter when the assessee had his total turnover from its business of manufacture was more than the prescribed limit he had been subject his accounts to audit and is complying with the provisions of Section 44AB regularly.

We are further of the opinion that failure to comply with such procedural provisions with which we are concerned, under a bonafide belief that the assessee is not required to act in a particular manner under the statute and which does not effect its rights and obligation

otherwise arising under the statute; nor by raising of objection, he obtains any advantage to which he is not otherwise entitled to; or where fulfillment of such requirement, the assessee becomes entitled to certain benefits of statute which requires strict compliance with requirement of law in the manner prescribed breach remains a venial and technical breach for which the penalty is not leviable merely because if it is lawful to do so.

In terms of law laid down by the Supreme Court, the penalty could not be levied for every venial and technical breach of procedural laws. In this connection, it may be apposite to draw attention to decision of Supreme Court in Hindustan Steels Ltd. Vs. State of Urisa 83 ITR 26 where it was laid down that even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute. In our opinion, the aforesaid ratio in Hindustan Steel Ltd.'s case fully governs the facts of the

present case and, therefore, the assessee was entitled to absolution from the liability to penalty under Section 271 B for non-compliance of Section 44 AB. Failure to comply with the provisions of Section 44 AB can be directly related to a bonafide belief by the assessee that he was not liable to get his account audited under Section 44 AB looking to the different nature of receipts by him from the different activities.

For the same reason, raising a contest by taking a plausible stand as true construction of statute which may ultimately be not found correct in the given circumstances constitutes a reasonable cause due to which the assessee can be said to have failed to comply with requirement of Section 44 AB by not getting his accounts audited for the relevant assessment year. If that were not so, it will be deterrent to tax a payer even to raise any plausible defence to contest his liabilities and obligations within the framework of statute itself. It will be altruist statement, that where the assessee succeeds in stand taken by him on construction of statute, no case will survive for levy of penalty. It is only where his contention fails on merit, and he

is found in breach of a given provisions ultimately, question of consequence befalling for such non-compliance arises. In that view of the matter, the opportunity could have been given to the assessee to remove the defects in return by complying with the requirement of law so that his return became complete. On the return being complete, no penalty could otherwise have been levied, as no breach would survive. In other case where the compliance with Section 44AB becomes redundant, due to completion of assessment, the question to levy of penalty has to be considered in the light of provisions of statute, in the present case Sec.271B read with Sec.273B.

It may also be noticed that for the reason that the accounts are not audited where Section 44 AB is attracted it does not affect the proper computation of income in terms of provisions of Act of 1961 nor does it effect any claim to any deduction by the assessee under any provisions of the Act. In such event the breach remains a technical breach of the procedural requirement. The conduct of the assessee cannot be said to be lacking or in bonafide or of gross negligence when he raised issue about the

interpretation of a provision which had used multiple expression, construction of which cannot be said to be self evident but needed interpretorial exercise. Because ultimately on constitution of statute the stand taken by the assessee is found to be wrong, it does not become a case of 'self-evident' interpretation, impinging on conduct of assessee. Even in the absence of provisions like Sec.273 B, which aptly governs the present case, the ratio of Supreme Court decision in Hindustan Steels Ltd., keeping in view the object of provisions of mischief it was intended to suppress.

Therefore, levy of penalty in the aforesaid circumstances under Section 271B to non-compliance of Section 44AB regarding assessment year 1994-95 cannot be sustained.

As a result, the appeal is allowed. The order of the Tribunal as well as the order of the CIT (Appeals) and Assessing Officer levying penalty against the assessee under Sec.271B are set aside. There shall be no orders as to costs and the penalty is quashed.

[MANAK MOHTA], J. [RAJESH BALIA], J.

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